PUBLIC PROSECUTOR

v.

NORZILAN YAACOB & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 19 OF 1985]
29 OCTOBER 1988

CRIMINAL PROCEDURE: *Trafficking - 1st and 2nd accused brothers - Jointly charged - Drugs found in 3 seperate areas of house - Prosecution lumping into one single charge one single quantity of drugs - Whether permissible - Section 163 CPC - No evidence found connecting the 2nd accused to drugs found - Acquitted and discharged - Charge amended against first accused - Information given by first accused to police leading to discovery of drugs - Whether admissible.*

Two brothers were charged under one charge for jointly trafficking cannabis.

The cannabis, in the form of rolls were found in relation to a 3-bedroomed house in 3 areas, 2 areas in the house and the third in the backyard of the said house.

When the police raided the house that day there were 3 persons in the house, the first accused, the second accused and a woman, Zaiton. The Court after much consideration, was of the view that there could be only one charge against the 2nd accused and that was in relation to the drugs found in the middle room. Here it was held that there was no evidence adduced to show that the 2nd accused had custody or control of the drugs and he was found not guilty of any offence and he was therefore acquitted and discharged.

The Court then decided that the only charge that could be preferred against the first accused is in relation to the drugs found in the septic tank in the backyard.

The joint charge was accordingly amended by the Court to one against the first accused. The prosecutions case was that the first accused gave one bit of information, that led to the discovery of the drugs in the septic tank and that he had brought the police to the compound of the house and pointed to the septic tank.

The first accused's evidence was that he did not give any information which led to the discovery of the drugs in the septic tank and that he did not lead the police there.

Held:

[1] There were various weaknesses in the prosecution case which they left the Court in a sense of inequietude.

[2] On the whole of the evidence adduced in this case the Court was left in a state of doubt whether the accused gave that bit of information which led to the discovery of the drugs in the septic tank and that the led the police to the place and pointed out to them whereupon the drugs were discovered.

[3] The accused is therefore acquitted and discharged.

[Accused acquitted & discharged.]

Case referred to:

See Yew Poo v. PP [1949] MLJ 31

Legislation referred to:
Criminal Procedure Code, ss. 112, 113, 163
Dangerous Drugs Act 1952, ss. 37(g), 39B(1)(a), (3)
Evidence Act 1950, ss. 24, 25, 26, 27
Penal Code, s. 34

For the public prosecutor - Ng Aik Guan, DPP
For the accused - Radzi Sheikh Ahmad; M/s. Radzi Sheikh Ahmad & Co.

JUDGMENT

KC Vohrah J:

Two brothers were charged under one charge that they jointly trafficked in 1513.21 grammes of cannabis at about 11.30 a.m. on 19 April 1984 at house number 52, Jalan AU 2A/12, Taman Keramat, Ampang, Selangor. Consent for the institution of the prosecution under s. 39(B)(1)(a) of the Dangerous Drugs Act 1952 was given under s. 39B(3) of the Act.

The evidence adduced showed that the 1513.21 grammes of cannabis, in the form of rolls, were found in relation to the 3 bedroomed house in 3 areas:

(1) in three spots in the middle room, one packet of rolls on a makeshift table, 6 rolls in a lady's boot, 118 rolls in a box which in turn was found in big cardboard box which formed the base for the makeshift table;

(2) in two spots in the kitchen, 2 newspaper packages containing 189 rolls on top of a cabinet and a plastic bag containing 4 newspaper packages holding 380 rolls in the gas tank compartment of a gas oven;

(3) in three spots in the backyard, 967 rolls in 2 packages concealed in a septic tank, 1563 rolls in a paint tin buried in the ground, 865 rolls in an earthern jar buried in another spot in the ground.

When the police raided the house that day there were 3 persons in the house, the first accused, the second accused and a woman Zaiton.The prosecution evidence was that the accused used the first room with Zaiton, and that the second accused used the middle room; in fact the second accused was sleeping in the middle room on the floor when the police raided the place. The prosecution evidence also showed that the second accused shared the middle room with one Ujang and that both the accused's sister Norizan used the third room together with a girl friend. There was also prosecution evidence that Zaiton's sister and the friends of the second accused who came to the house to practise band music had access to the house. Nothing was found in the other two bedrooms except for two "piggy banks", one containing RM2763.80 and the other RM1020 in the first room and one "piggy bank" containing RM304.75 in the third bedroom.

As regards the middle room there was no connection between the first accused and the room although Inspector Mohd. Noor who led the police party to the house stated that the first accused brought the party to the middle room when the first accused was asked to show the police where he slept that day. The evidence of Zaiton, a prosecution witness, however, was that the first accused was sleeping in the first room when the police knocked at the door and that the first accused always slept in the first room.

As for the kitchen which had a dining table it would appear from its position in the house that it was freely accessible to those in the house. Zaiton did state that she saw the first accused once take one or two rolls from the gas tank compartment of the oven to smoke

them but when that was done was not in evidence. Also in evidence was that when the two accused were brought to the kitchen and questioned by the police the second accused looked at the cabinet where 2 packages of cannabis were eventually found.

In regard to the backyard of the house the evidence was that the accused gave one bit of information and brought the police party to the back door of the house. On stepping into the backyard the first accused pointed to a septic tank which had a cover over it. In this septic tank was discovered 2 packages of cannabis rolls. There were signs of earth being freshly dug in two places further away from the septic tank. These spots were dug out and in one spot was found a paint tin with cannabis rolls and in the other spot was an earthern jar also with cannabis.

I shall now consider the charge as it relates to the second accused and the matter of joint concert under s. 34 of the Penal Code; the two accused were charged that they jointly trafficked in the drugs. It is true it was cannabis rolls which were found in 3 areas in relation to the house but there does not appear to be a nexus between what was found in the middle room and what was found in the kitchen and what was found in the backyard. The facts as outlined above show that the prosecution is relying on evidence which it thinks implicates the second accused in regard to what was discovered in the middle room. The prosecution evidence however does show that the first accused did not use that room at all. What then is the joint concert under s. 34 of the Penal Code between the first accused and the second accused in relation to the drugs found in the middle room? To my mind, nothing at all. To my mind there should have been, if at all, a separate charge against the second accused in respect of the drugs found in the middle room.

In respect of the drugs found in the kitchen, as was pointed out earlier, it was the prosecution evidence that the second accused looked at the cabinet where drugs were subsequently found when he and the first accused were questioned by the police. That might signify knowledge that he knew something was in or on the cabinet but that does not establish his control or custody of the 2 packages of drugs found on the cabinet. The prosecution argue that there is evidence to show the first accused had custody and control of the said drugs but that will be considered later. Suffice it to say the prosecution has not established a nexus between the second accused and the first accused in relation to the drugs found in the kitchen.

As for the drugs found in the 3 spots earlier mentioned in the backyard there is not an iota of evidence connecting him to the drugs or the first accused in relation to the drugs discovered in the 3 spots. The prosecution argue that there is a case for the first accused to answer in respect of the said drugs found in the backyard but that will be considered later.

In my view no joint concert has been established between both the accused. If at all, and that will be considered in a short while, there can only be one charge against the second accused only and that is the relation between him and the drugs found in the middle room.

From the foregoing it is clear the prosecution has lumped into one single charge one single quantity of drugs found although separate quantities were found in the middle room, the kitchen and the backyard; there should have been a breaking up of the quantity found into separate quantities in relation to where the drugs were found; and the appropriate person charged accordingly. More than one distinct offence have been mentioned in the single charge against both the accused. And s. 163 of the Criminal Procedure Code, *inter alia*, provides that for every distinct offence of which any person is accused there shall be a separate charge. Following *See Yew Poo v. PP* [1949] MLJ 31 it would not appear that the joinder in

one charge of two or more distinct offences is an illegality fatal to the trial; it is an irregularity and I propose to consider what possible distinct offences appear from the evidence and what charges they can be framed into.

Let me state what I consider to be possible separate offences in this case. First in relation to the second accused.

The first offence relates to the drugs found in the middle room. If at all, the offence should have been directed against the second accused for possession of cannabis. The prosecution has argued that the second accused was an occupier of the said room and being such, since drugs were concealed in the lady's boot and in the cardboard box which was the base of the makeshift table, the drugs must have been concealed with the occupier's knowledge using the presumption under s. 37(g) of the Dangerous Drugs Act. Many authorities were cited to show that it could be inferred that he had custody or control of the drugs discovered in the middle room. But with respect the evidence was clear that Ujang too had access to the room; he shared the room with the second accused. In fact there were also ladies shoes in that room although an attempt was made to show that they could have belonged to a sister, who on hearsay evidence, had gone to Australia. No evidence of any overt act by the second accused was shown in relation to the drugs discovered in the second room. There was no evidence that was adduced to show he had custody or control of the drugs. True there is a presumption of knowledge of the drugs found concealed if he is considered an occupier but custody or control of the drugs does not flow from knowledge that the drugs were concealed. In my view therefore even if the accused is charged for an offence of possession of the drugs found in the middle room, the charge would not succeed.

As for the drugs found on the kitchen cabinet again his looking at the cabinet may have signified his knowledge that the drugs were kept there. That is all. No more. No charge against him for possession for the drugs found on the kitchen cabinet would succeed. And of course there is no evidence connecting the second accused with the drugs found in the backyard.

The result is he is not guilty of any offence and he is therefore acquitted and discharged.

Now I turn to what offences appear to be made out against the first accused.

As regards the drugs found in the middle room there is no evidence connecting him with the drugs. So no amended charge can be framed in respect of the drugs in that room.

As regards the drugs found in the kitchen, freely accessible to many, the question is whether there was any overt act of his which had a nexus with the drugs found on the cabinet and in the gas tank compartment of the oven. Zaiton saw him take 1 or 2 rolls from the oven but it is not known when that was done and I would hesitate to act on this piece of evidence. The prosecution also showed that the accused made a statement which purportedly led to the discovery of some drugs in the backyards. Apparently in answer to the question posed by Inspector Mohd. Noor, "Adakah lagi ganja di simpan mana-mana bahagian rumah tersebut" he replied,

> Ya saya **masih** ada simpan lagi di bahagian belakang rumah.
>
> Yes I **still** have some kept at the back of the house.

This was the evidence of Inspector Mohd. Noor, PC. Yunus who was with Inspector Noor and 2 other police personnel said,

After being asked the first accused more or less said he kept ganja at the back of the house.

The other police personnel Corporal Sharom said he heard the first accused say,

Ya, ada lagi ganja di belakang.

Even if I accept on a *prima facie* basis that the accused did make a statement to Inspector Mohd. Noor that part indicating a nexus between the drugs found in the kitchen and the drugs found at the back of the house I intend to ignore; only the part of the statement disclosing that he kept ganja at the back of the house is admissible as it distinctly relates to the drugs discovered in the septic tank and that discovery alone. The rest of the statement showing the relationship of the accused to the drugs in the kitchen and the drugs at the back of the house cannot be used as an admission that the drugs already discovered in the kitchen were his. To do otherwise would be to misuse the provisions of s. 27 of the Evidence Act so as to allow any police officer to put his question to a person in custody in such a way as and to juxtapose the words therein to give the impression that the person in custody gave information which not only led to the discovery of a fact but also contained an admission in relating to an already discovered fact negating the provisions of ss. 24 to 26 of the Evidence Act and circumventing the provisions of s. 113 of the Criminal Procedure Code and provisions of the written law relating to cautioned statements. Only so much of the information as relates distinctly to the fact discovered is admissible.

To my mind no offence has been made out against the first accused in respect of the drugs found in the kitchen.

I now come to the drugs found in the backyard. I have already set out what the accused is purported to have said which led to the discovery of the drugs in the septic tank. The defence in their cross-examination of the police witnesses, Inspector Mohd. Noor (PW1), Constables Yunus (PW4) and Zaki (PW5) and Corporal Sharom attempted to show that the first accused never made the statement. This was denied.

On a *prima facie* basis I accept that the statement was made and the statement was to the effect that there was ganja kept by him at the back of the house.

The prosecution evidence was that the accused then led the police to the back door and the back door was opened by Zaki. The accused pointed to the septic tank. On the instruction of Inspector Mohd. Noor, Zaki removed the cover on top of the septic tank and 2 packages of 967 rolls of cannabis were removed from the septic tank. To my mind the statement made by the accused and his pointing to the septic tank led to the discovery of this lot of cannabis in the septic tank. According to the chemist report the cannabis weighed 344.91 grammes.

Inspector Mohd. Noor said that after he recovered these packages he saw 2 freshly dug spots at the back of the house. These two spots appeared to be some distance from the septic tank. When Inspector Noor saw these two spots he asked the first accused, "Apa kesan galian itu?" ("What are the signs of digging?"). The accused replied, "Kalau nak tahu gali sendiri". ("If you want to know dig yourself"). From these two spots after the earth was dug out were discovered a paint tin and a earthern jar, each containing cannabis. However to my mind it is clear that neither the statement made in the kitchen by the accused leading to the discovery of the drugs in the septic tank nor the statement "Kalau nak tahu gali sendiri" were statements which led to the discovery of these two lots of drugs found buried in the ground.

From the foregoing my view is that the only charge that can be preferred against the first accused is in relation to the drugs found in the septic tank and I accordingly amend the charge against him to read as follow:

> That you on 19 April 1984 at about 11.30 a.m. in the compound of the house No. 52, Jalan AU 2A/12, Taman Keramat, Ampang in the District of Gombak, in the State of Selangor, did traffic in dangerous drugs, to wit cannabis weighing 344.91 grammes and that you have thereby contravened the provision of para. (a) of s. 39B(1) and punishable under s. 39(B)(2) of the Dangerous Drugs Act 1952.

The charge shall be read and explained to the accused and if he claims trial to the charge I will allow him to recall witnesses and then consider the totality of the prosecution evidence before deciding whether to call for the defence or not on the amended charge.

Dated 14 October 1988.

Defence

The original charge against the two accused for the joint trafficking in drugs and which stated that the drugs were found in the house and in the compound of the house was amended by the Court to one against the first accused only and the second accused was acquitted at the close of the prosecution's case; and this amended charge against the first accused related only to the drugs found in the septic tank in the compound of the house and not to the drugs found buried in two other spots in the compound. It was the prosecution's case that he gave one bit of information that led to the discovery of the drugs in the septic tank and that he brought them to the compound of the house and pointed to the septic tank.

The first accused recalled Doraisamy (PW7), the investigating officer of the case. It was elicited from him that the septic tank was close to the rear door of the house and that one of the spots dug out was close to the rear fence (about 4 feet between) and about 7 to 8 feet from the gate at the rear fence.

The first accused made his defence on oath. He called his sister Norizan (DW2) and his father (DW3) to give evidence.

He denied giving any information which led to the discovery of the drugs in the septic tank. He denied bringing the police to the compound of the house. He denied knowledge of the drugs discovered in the septic tank. And he stated that he only occasionally lived in that house, to which several people had access, when he went there to visit his brother or sister; or if he had to meet his girl friend Zaiton. He said that on the day of the raid in his house he was sleeping alone in the front room after he had arrived there in the morning; he had earlier helped his sick father to do some marketing for the food shop at the place where he normally lived at Kg. Chendana. He said that while he was with Kelana in the kitchen being questioned by the police after they had recovered cannabis and the 3 "piggy banks" within the house, he heard someone at the back of the house say, "Ini ada lagi! Ini ada lagi!"; and he was brought to the back compound of the house and shown a jar and a paint tin containing cannabis; the back area was searched and more cannabis was discovered inside the septic tank. He denied knowledge of all the cannabis found in the compound of the house.

The first accused gave detailed evidence. Briefly the evidence was to show that his father had two houses, the one at Taman Keramat (which the police raided) and the other at Kg. Chendana where he lived with his father and his stepmother and some of his brothers and sisters. He assisted his father in running an eating shop which was attached to the Kg.

Chendana house. His evidence was that his father had shifted from the Taman Keramat house to the Kg. Chendana house (where he previously was) to facilitate easier schooling for the first accused's step brothers. He visited the Taman Keramat house once in a while to look up his brother and sister who lived there. His father (DW2) gave evidence which was substantially of similar effect. There were some minor discrepancies including why he (father) moved to the Kg. Chendana house - he stating that when he shifted to Kg. Chendana the accused did not move out from the Taman Keramat house but lived in the Kg. Chendana house returning to the Keramat house once in a while especially after one of his daughters had met with an accident. I accept the thrust of the evidence of both of them that the first accused, when he assisted the father in the eating shop at Kg. Chendana, lived at Kg. Chendana and made occasional visits to the Taman Keramat house.

One other aspect of the evidence of the accused was to show that at time of the arrest his younger sister Norizan lived in the third bedroom and the evidence was that she had a rent paying friend, Linda, who stayed in that room until she got married and moved out and that after that Norizan had number of friends who visited her with some spending the night with her. He also stated that his step brother Kelana moved from the front room to the middle room and occupied it with a friend, Ujang after the first accused's sister, Norma, left the room in early January 1984 when she went to Australia. And he said he lived in the first room off and on. And he lived in that room together with one Zaiton whom he had befriended a year prior to the arrest.

I can accept his evidence on these matters as all these were substantially corroborated by prosecution witness Zaiton (PW2), who had stated that Norizan had a lady friend Nor who lived with her in the backroom, that Kelana lived in the middle room with one Ujang who moved in after the first accused's sister moved out, that she (Zaiton) had befriended the accused some several months before his arrest and that she and the first accused occupied the first room and that normally when she went there the first accused was not there. From her evidence about sleeping arrangements when she was there before the accused's sister left the middle room, it seems clear too that the accused at times did not come back to sleep at the Taman Keramat house. The first accused's sister Norizan also gave evidence on these matters but I am not placing any weight on her evidence as I found that her evidence on 4 separate issues materially contradicted her statement made under s. 112 of the Criminal Procedure Code to a police officer which was proved to have been made by her in compliance with the said s. 112; she persisted in stating that either she did not make statements on the 4 issues or that the statement that was recorded was not read back to her or that she did not understand the Bahasa Malaysia of the officer who was an Indian. In the statements on the 4 issues her speech was reported in direct speech in simple Bahasa Malaysia. I assessed her credit at the close of the defence viewing her evidence as a whole with the rest of the evidence and my view is that her whole evidence has to be disregarded.

The first accused's evidence was that all the persons named by him and his other brothers and sisters had keys to the house at Taman Keramat. I have no reason to disbelieve him.

He said that he went to the Taman Keramat house to visit his brother and sisters off and on; and he would visit Zaiton who would drop in at the house usually after informing him of her intended visit at the Taman Keramat house. I see no reason to disbelieve his evidence on the matter.

I now come to his account of the events leading to his arrest at the Taman Keramat house.

He said that the night previous to the day of his arrest he had promised to meet Zaiton at the Taman Keramat house. He could not make it as his father was ill and he had to do marketing for him the next morning. After having done the marketing the next morning he left for the Taman Keramat house arriving there before 7. He had a quarrel with Zaiton for failing to meet her the previous night and Zaiton moved out of the front room and he went and slept in that room. He was awakened by the sound of knocking on a door and Zaiton then entered the room and told him that there were people outside the door whereupon he went out of the room and saw someone at the window and that someone requested him to open the door.

I can accept his evidence that he did not stay the previous night at Taman Keramat. I can accept the evidence that he went to the Taman Keramat the morning of 19 April 1984 and had a quarrel with Zaiton and that Zaiton moved out of the front room and he then went to sleep in that room; that was the evidence too of prosecution witness, Zaiton, who also corroborated his evidence that it was she who woke him and told him that someone was knocking at the door.

It seems clear that the first accused made occasional use of the Taman Keramat house and that he went to that house on the morning of 19 April 1984, the day of his arrest. It is also acceptable that others frequented the house, some stayed in the house including Ujang and the lady friend of Norizan, and many had keys to the house and therefore access to the house. But did all these mean that he had no opportunity to hide the cannabis and that one of those who had access to the house had opportunity so to do? On the other hand the Taman Keramat house was a quieter place for the first accused with hardly any prying eyes unlike the crowded house at Kg. Chendana which housed his father, his step-mother and his little step brothers and sisters. He also had free access to the Taman Keramat house at any time of the day and he had every opportunity, if minded so do, to secrete the cannabis in the septic tank. And that to me is the question which the Court has to consider. Did he keep it there? No one saw him do it. So what is the evidence? The prosecution says the first accused gave a bit of information which led to the discovery of the cannabis in the septic tank. The accused denies that. And so the Court would have to move from the evidence relating to peripheral matters to the evidence relating to the search in the house, the discovery of cannabis in the middle room and the kitchen and the discovery of the cannabis in the septic tank.

The first accused said that he unlocked the front door whereupon 3 males entered the room and one of them stated, *inter alia*, that he was Inspector Mohd. Noor and that he had information this "house had drug activities." The first accused told him "Mana ada?" and Inspector Mohd. Noor stated that he wanted to make a search and the first accused invited him in.

This evidence is substantially similar in effect to the evidence of PW1 on the matters. The first accused said that the police took him to a place near the entrance of the front room, saw Zaiton who was then lying on the mattress and one of them asked him whose room the middle room was and he replied it belonged to his brother Kelana. They opened the door to this room and entered it. Kelana was sleeping on the floor next to a bed. The men asked Kelana to get up and made him sit on the bed with him. These matters too coincided with the prosecution evidence except that PW1 stated that when the first accused was asked where he slept that day the first accused brought him to the middle room. Zaiton herself had testified that the accused occupied the first room and I do not accept the Inspector's evidence that he asked the first accused where his room was and that he brought him to the middle room.

Since he occupied the first room and no drugs were kept there it seems logical that he would have brought the police there first if indeed he was asked where he slept that night. It is more probable the police did not enter the front room first because they saw Zaiton lying on the mattress.

The first accused said that the police then searched the room and pulled out a bag from under the bed and unzipped it and asked whose it was. According to the accused Kelana said it was Ujang's. The accused said a package and drugs in a lady's shoe were discovered. Inspector Mohd. Noor was cross-examined about a clothes bag found in the room and which was searched but he said he could not remember. Perhaps the bag was there.

While the evidence of the first accused confirms the prosecution evidence that the middle room was searched the rest of his evidence relating to the sequence of events after this differs substantially from the prosecution evidence.

The first accused said that after the search of the middle room had been conducted he was brought towards and partly into the front room and one of the men told Zaiton to get up and change. She went out of the room and someone then searched that room.

The evidence of Inspector Mohd. Noor was that both the first accused and Kelana were brought straight to the kitchen and that the police went to the first room after cannabis was discovered in three spots in the compound of the house and after these were placed on the dining table of the kitchen; he found Zaiton sleeping in the room and 2 "piggy banks" were discovered there. Detective Corporal Sharom (PW6) testified that although he could not remember entering the front room before going to the back he entered the first room after the "discovery of all things" and he saw a girl in that room. Zaiton (PW2) herself stated that the police did eventually came to her room (the front room) to wake her up. But she said, "After they woke me up they left the room. I saw packages on the table". Can it be said that since packages were seen on the table in the kitchen then the first accused's story, that before they went to the kitchen they had partly entered the front room and whereupon Zaiton was asked to get up and change and that she left the room, cannot be true? The point is, according to the accused's story, the party partly entered the room (in fact he showed what he meant in Court).It seems clear that the party must have withdrawn from the door before Zaiton got up and went out. By that time the packages of cannabis from the middle room could have been placed on the table. She did not say she saw a jar or a tin, both with distinctive features, on the table which could have definitely fixed the time when the police went to the front room. The first accused's story could be true.

The first accused said that he was then taken to the kitchen and asked to sit on a chair, he being handcuffed to his brother. He said that in reply to a question put by someone he stated that the room (where he had said Zaiton had come out from) was occupied by himself and the girl. And someone was searching that room. According to him someone else was searching at the refrigerator, the cabinet and the oven while he was being questioned and he came to know about the recovery of a plastic bag when it was placed on the dining table.

According to him on being told by him that the back room belonged to his younger sister, the person who questioned him then took him to the back room and they remained at the entrance to the room and he saw that someone was checking clothes in that room. He said "they" took a "piggy bank" from the dressing table and when asked whose it was he said he did not know but that the room belonged to his younger sister.

He was then taken back to the kitchen and he saw two more "piggy banks" on the dining table. He also saw plastic packages on the table. He said he and Kelana were questioned about the plastic packages and the money in the "piggy banks" when he heard the voice of someone from the back of the house say, "Ini ada lagi! Ini ada lagi!" then he was taken to the rear of the house through an already opened back door and on arrival at the back of the house he saw there was someone already there. That someone came to the entrance of the back door with a jar. He put the jar in front of him and went back to get a paint tin which he also placed in front of where he was standing. And according to him that man asked, "Whose is this?" He replied, "How could I know?" and he told him to ask Kelana as he was always in the house. After he was shown the contents of the tin he was questioned about the contents and he said that "they then searched the back compound of the house looking under some stones and bottles". He said that while someone was questioning him, another went to the trees and another searched under stones. Then they removed the cover of the septic tank and took out 2 plastic packages and questioned him as to their ownership. They continued searching at the rear compound and later they then took him to the kitchen of the house. He saw one of them enter the middle room, another the bathroom and yet one more the front room. He said he saw one man come out of the front room with 2 video cassettes and 6 or 7 magazines on motor cycles. He also saw someone searching the hall.

As I have already stated earlier the first accused's description of the sequence of events after the search of the middle room is at variance with the prosecution evidence. His evidence was to the effect the whole house was searched and then the search was extended to the back of the house where the tin and jar of cannabis rolls were discovered in the course of the search. And his evidence was that he did not give any information which led to the discovery of the drugs in the septic tank and that he did not lead the police there. The evidence of the prosecution on the other hand was that after the middle room was searched and several seizures of cannabis made in that room, the first accused and Kelana were brought to the kitchen.

Then, according to Inspector Mohd. Noor, at the kitchen "I conducted an interrogation - I questioned them whether there was anymore ganja kept anywhere in the area. I conducted a search. I found two newspaper packages on top of the cabinet". He said he subsequently looked at a gas oven which was covered with a piece of cloth which aroused his suspicious and he found a plastic bag in the gas cylinder compartment of the oven. Under cross-examination it transpired there was no interrogation by him prior to the discovery of the drugs in the kitchen. He said, under cross-examination, that he instructed Zaki and Yunus to converse with the first accused and Kelana while he sat in a chair and observed their reaction. It lasted 5 to 10 minutes. He did hear the conversation but it was not clear and he had forgotten what it was all about. But he said he observed the second accused looking at the cabinet and he recovered cannabis from the cabinet. Inspector Mohd. Noor said that Zaki and Yunus did not assist him in the search in the kitchen. Zaki who gave evidence of the discovery of drugs at the back of the house did not touch on this aspect of the evidence. Yunus said he spoke to both the suspects but did not ask questions and that Zaki fetched a glass of water for the first accused. He could not remember the conversation. He denied that he interrogated the suspects and they admitted nothing. He denied that after the recovery of certain things in the kitchen he was instructed to search other parts of the house and the kitchen.

I now come to the sequence in the prosecution's case and this relates to the bit of information which the first accused supposedly gave to Inspector Mohd. Noor.

According to Inspector Mohd. Noor after he had recovered the cannabis in the kitchen he suspected that there was more cannabis (ganja) kept in the house and he interrogated the first accused. He asked him,"Adakah lagi ganja disimpan di mana-mana bahagian rumah tersebut?" According to Inspector Mohd. Noor, the first accused did not reply. Inspector Mohd. Noor then advised the first accused that if the police conducted a search and if anymore ganja were to be discovered his father who owned the house would get into trouble. The first accused kept silent for a while and then said, "Saya masih ada simpan lagi di bahagian belakang rumah". Inspector Mohd. Noor did not record what he said. When asked why he did not write down the exact words, he replied, "May be that was one of my weaknesses". Zaki did not touch on this aspect of the evidence. Yunus said that after being asked by Inspector Mohd. Noor "the first accused more or less said he had kept ganja at back of house". He too did not jot down what was said in his note book. He said he did not do so "because firstly we have to be consistent with police report and the best place to do is at Balai where the situation is calm". When asked what he meant by "consistency" by the DPP he said inconsequentially that normally he would enter his pocket book at the police station. Corporal Sharom said he was present (after he had come from guarding the back of the house) when he heard the first accused say to Inspector Mohd. Noor, "Ya, ada lagi ganja di belakang". He said he did not jot down what the accused said as "How can I jot down what others have said?"

Inspector Mohd. Noor said that the first accused took him to the rear portion of the house and on arrival at the back door he (Inspector Mohd. Noor) instructed Detective Zaki to open the door. On entering the back portion of the house the first accused pointed with his extended right fore finger to a septic tank. Inspector Mohd. Noor said he instructed Detective Zaki to remove the cover over the septic tank and that Zaki removed a plastic bag which was placed on two bricks in the manhole. Zaki however said he removed 2 packages from the hole.

Inspector Mohd. Noor then saw the fresh signs of digging at two spots and a tin of cannabis was found buried in the spot by Corporal Sharom and a jar of cannabis was found buried in the other spot by Yunus.

The accused's story of the events in the house showed that there was a search in the house, from room to the kitchen, to front room, to back room and that the search extended to the back compound of the house where the police themselves discovered the drugs buried there and the drugs kept in the septic tank. It is argued that since Corporal Sharom was stationed at the gate of back fence of the house - and it was adduced from the then IO of the case, Doraisamy, that the spots which had signs of fresh digging were near the fence, one of which being about 7 to 8 feet from the fence - the freshly dug spots could have easily been seen by Sharom. Sharom in his evidence said he was 15 to 20 minutes standing guard at the back of the house. He was a corporal. I find it strange that he did not see the signs of fresh digging at two spots and that he did not act on what he saw unless he was like Inspector Mohd. Noor who when asked whether he would dig the spots which had fresh signs of digging, said, "Although I suspect I would not dig".

I find it strange that the police chose not to search the house from room to room immediately after the middle room was searched. I find it strange too that Inspector Mohd. Noor preferred to question the two suspects before proceeding with the search in the kitchen which from the photographs (P2D and E) and the sketch plan (P3) appear small with only a few things there which needed searching, a cabinet, a refrigerator and an oven if one discounts the dining table, the wash basin and the open rack for plates and saucers. Inspector Mohd.

Noor went to the house with Yunus, Zaki and Sharom. Sharom was asked to guard the rear of the house outside the house. Was it normal to have the other two remaining policemen in the kitchen with him when the small kitchen was being searched by himself? Or was it possible that as stated by the first accused one of the policemen was searching the front room after Zaiton was told to go out and that while he was being questioned by one of the policemen the other went to the back room to search it?

I cannot help feeling some misgivings over the quality of the evidence of the prosecution witnesses especially that of Inspector Mohd. Noor. Was he not embellishing his evidence? He said when he entered the room he asked the first accused to show him where he slept and that the accused showed him the middle room. But the evidence of the prosecution witness, Zaiton, was that the first accused always occupied the front room. Why, if indeed the inspector did ask that question, did the first accused lead the police to the middle room, the room of his brother and Ujang where drugs were found? And not to the front room which was his where no drugs at all were found?

Prosecution witness Zaiton under cross-examination stated that the police also took away 1 or 2 video tapes and some magazines from the front room. Another prosecution witnesses Constable Zaki and also Corporal Sharom denied that any tapes were recovered but they said they could not remember about the magazines. In view of Zaiton's evidence I find the replies of the two unreliable. Could it be true as stated by the first accused that one of the police party came out from the room with 2 video tapes and 6 or 7 magazines on motor cycles and these were brought to the Police Station and that in regard to the video tapes he was asked whether they were "blue tapes" and he said they were "Indonesian tapes". I think so.

I now come to the search list (P27) drawn up by Inspector Mohd. Noor. It lists the exhibits seized at the house and it is stated under the column "Dimana Jumpa & Oleh Siapa" ("Where Found & By Whom") that Inspector Mohd. Noor found them. It is clear that he only discovered the exhibits which were in the kitchen. Why then did he state in the search list that all the items listed were seized by him? He explained that he was the head of the police party and therefore he wrote down that the items were recovered by him. I can accept the explanation but it does show a very careless attitude on the part of the inspector. This is also reflected in the police report (P29) where he stated that it was he who discovered the drugs in and outside the house.

There was also some other disquieting features in the police report. It was made late at 4.15 although the police left the Taman Keramat house at about 1.45 to 1.50 p.m. but I accept his explanation that he had to count the exhibits and prepare the search list before that. The point is, in the absence of other factors in the case connecting the two suspects with the drugs in and outside the house there was need to show the most vital link between at least the first accused and the drugs at the back - a link already available if the event actually took place i.e., the statement made by the first accused which led to the discovery of the drugs at the back; a statement which could be sought to be admitted under s. 27 of the Evidence Act 1950. This was not done.

That is what he stated in the report after stating the fact of discovery of the cannabis in the kitchen,

> Selepas itu saya menjalankan soal siasat dari kedua OYDS tersebut yang mana kemudian yang (1) Norzilan bin Yaccob telah membawa saya ke bahagian belakang rumah tersebut dan menunjukkan di mana tempat-tempat ia sembunyikan lagi barang yang disyaki ganja.

It can be seen that there is no mention that the first accused (Norzilan) gave a bit of information, or the nature of the information, which led to the discovery of the drugs at the back. It can also be seen that Inspector Mohd. Noor reported that the first accused showed the places where the drugs were found. The prosecution evidence is that the first accused only pointed to the septic tank, he did not point to the other two spots where there were fresh signs of digging; in fact Inspector Mohd. Noor said he spotted them and he asked the first accused, "Apa kesan galian?" and the accused replied, "Kalau nak tahu, gali sendiri". It can be argued that Inspector Mohd. Noor did not put in details into the report as a police report should be brief; but is not that bit of information supposedly given by the accused so vitally important that is should be included in the brief statement? Then again why was the report inaccurate as pointed out? Was it carelessness on the part of the inspector in drawing up the report? Or was it that the accused did not give any information which led to the discovery of the drugs in the septic tank?

The various weaknesses in the prosecution case leave me with a sense of inequietude. The weaknesses, some inherent, some apparent when views against the defence story, as I have set out earlier, render the prosecution case limp. On the whole of the evidence adduced in this case I am left in a state of doubt whether the accused gave that bit of information which led to the discovery of the drugs in the septic tank and that he led them to the place and pointed it out to them whereupon drugs were discovered.

The accused is therefore acquitted and discharged.

Also found at [1989] 1 CLJ 466